SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

METRENSKY-BIBLIOTEEK
UNIVERSITEIT VAN PRETORIA
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CASE No. 58.

MZIWANDILE PILISO *v.* SHADRACK GCWABE.

BUTTERWORTH: 19th May, 1949. Before J. W. Sleigh, Esq., President, Elston and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Seduction and pregnancy—Damages—Under common law once carnal connection is established or admitted woman's oath as to paternity preferred to that of man—Defendant must rebut evidence of carnal intercourse—Defendant's passion for woman coupled with opportunity affords the corroboration required by law.

Appeal from the Court of the Native Commissioner, Willowvale.

Sleigh (President), delivering the judgment of the Court:

This is an appeal against a judgment for plaintiff for five head of cattle or their value, £25, as damages for the seduction and pregnancy of plantiff's daughter Mavis.

The judgment is attacked on appeal on the grounds that it is against the weight of evidence and that it is bad in law for the reasons:—

(*a*) The Native Commissioner held, or appears to have held, that there was an onus additional to the normal onus of rebuttal upon the defendant, and

(*b*) The Native Commissioner erroneously accepted the oath of the woman, the witness Mavis Gcwaba, in preference to that of the man, the Defendant.

It appears that the Native Commissioner held that the onus was on defendant to prove that it was impossible for him to be the father of the child. He relies on the case Nojantsholo *v.* Nkosana and Ano. [1941 N.A.C. (C. & O.) 81]. In that case Scott (Acting President) relying on Stander *v.* Macdonald [1935 (1) P.H. M.31] said that " under common law once carnal connection is established or admitted the woman's oath as to paternity is preferred to that of the man " and pointed out that this principle is practically the same in native law and quoted the native assessors opinion in Sontundu *v.* Damane and Ano. (3 N.A.C. 261) as follows " under native custom, if intercourse is proved the woman's statement as to the paternity is usually believed although more than one man may have visited (*metshaed*) her ".

In Stander's case (the full report is to be found in 1935 A.D. 325) Macdonald admitted that he had had intercourse with Stander about the time she conceived. Proof of intercourse was therefore unnecessary. In Nojantsholo's case the first defendant had admitted that he had *metshaed* with the girl. This admission, in native law, threw the onus on him to clear himself [Dalisle *v.* Dungulu and Ano. 1940 N.A.C. (C. & O.) at page 86]. It is in the light of this admission that what was said in Sontundu's case must be read. Ordinarily when intercourse at the time the woman conceived is denied there is no onus on a defendant other than to rebut the plaintiff's case [Boyana *v.* Dyamani 1946 N.A.C. (C. &.O) 74]. If he is unsuccessful in this, judgment will be given against him also for damages under native law in respect of the pregnancy, unless he can prove that it was impossible for him to have caused the woman's pregnancy. If he fails in this then the woman's oath as to paternity is preferred to that of the man unless she is unworthy of credence (Rossouw *v.* Chetty 1939 E.D.L. 277). In the present case there is no admission that defendant had intercourse with Mavis when she conceived. The only onus on defendant is therefore to rebut the evidence of carnal intercourse at the time she says she conceived.

Defendant lives in the village of Willowvale. Mavis says that in 1947 she was teaching at Xonyeni school but paid periodical visits to Willowvale and met defendant for the first time in November, 1947. He proposed love to her and wrote her two letters dated 15th and 23rd November, 1947 (Exhibits A and B). She accepted him and he had carnal connection with her on the first occasion about 28th or 29th November, 1947, at Dlulani's house. Thereafter he had intercourse with her three times during December, 1947, at Dr. Xaba's house. She says that she menstruated for the last time on 14th December and concludes that she became pregnant as a result of intercourse on the third occasion during December; namely, on the evening of the 24th December. It is suggested that she is mistaken and that she actually became pregnant as a result of the intercourse in November, but we must accept her evidence that this in not so. She states further that she missed her periods in January, 1948, that she reported her condition to defendant in February; that on this occasion he had intercourse with her and that shortly after this she received letter " C " which is not dated and in which he accuses her of consorting with other men and rejects her as a lover. The child was born on the 11th September, 1948.

The Native Commissioner was impressed with her evidence which he accepted. Even so, it required corroboration by evidence *aliunde* which to some extent is consistent with her testimony and inconsistent with the evidence of defendant (Bekker *v.* Westenraad 1942 W.L.D. 214).

Defendant admits having written letters A and B, but as these were written before he had intercourse with her they do not afford that corroboration which is required by law. He further admits the intercourse in November, 1947, and states that the next time he saw her alone was on 12th December. He desired to have intercourse with her then but she was menstruating. He says that about this time he saw her associating with other men and when his witness, Qupa, brought her to his room between Xmas and New Year he told her that he would have nothing more to do with her and took her to Dlulani's house where he found Qupa and told him what he had done. He says that the next day he typed letter " C " in the presence of Qupa, typed the address on the envelope and posted it to Mavis. Qupa corroborates his evidence in regard to the incident between Xmas and New Year, and in regard to the typing of letter " C " and the envelope.

His admission that he had intercourse with her in November and also desired to have intercourse with her on 12th December show that his love for her was not merely emotional, but that he also desired her to gratify his lust. We are therefore entitled to assume that he would have had carnal relations with her after 12th December if an opportunity offered. The question therefore is whether he had this opportunity as Mavis says, or whether he put an end to their friendship on the first opportunity after that date as he avers.

Mavis says that letter " C " came in the envelope which she produced. It is an ordinary envelope addressed in his handwriting to her school address. It is not disputed that the address is in defendant's hadwriting. The post office date stamp on the envelope is indistinct, but under a magnifying glass it is clear that the date is 11.II.48. Now, according to defendant he did not communicate with Mavis in February except to return her photographs. She denies that these were returned to her, but even if they were, they could not have been enclosed in this envelope as he admits that the larger of the photographs would not fit into an ordinary envelope unless it was folded. He does not say that it was folded and it is very improbable that he would have folded it. It follows, therefore, that the envelope must have contained letter " C " as Mavis says, and consequently the evidence of defendant and Qupa that the letter was written at the end of 1947 is false. It follows further that their relationship continued until February, 1948.

Now, Mavis says that defendant found her at Dlulani's house on the evening of 24th December, 1947, and took her to his room at Xaba's house where he had intercourse with her. He denies this, but why was he so anxious to persuade the Court that he had terminated their relationship in December? If his evidence is true that he had intercourse with her only once, and that in November, and that he did not meet her on 24th December, it would have suited his defence equally well, if not better, if he said that he had written the letter in February. It seems to me that the most probable explanation for this false statement is that he is trying to hide the fact that he had met her in his room on 24th December. I satisfied am, therefore, that we must accept Mavis's evidence that he did meet her on this date.

When we consider his admitted passion for her up to 12th December and bearing in mind that his feeling for her continued until February, 1948, and that he had the opportunity on 24th December to gratify that passion, it is impossible to reject Mavis's evidence that he had carnal intercourse with her that evening. His passion for her coupled with the opportunity is consistent with her testimony that he had intercourse with her and is inconsistent with his innocence. It affords that corroboration which is required by law.

The appeal is dismissed with costs.

For Appellant: Mr. Wigley, Willowvale.

For Respondent: Mr. Dold, Willowvale.

CASE No. 59.

SIPINGO GXAMZA *v.* HOZA MAKWAYIBA.

BUTTERWORTH: 19th May, 1949. Before J. W. Sleigh, Esq., President, Elston and Rein, Members of the Court (Southern Division).

Native Appeal Case—Practice and procedure—Rescission of default judgment—A party is not in default if represented by an attorney—Native Commissioner's Court has no jurisdiction to rescind a judgment given in presence of party's legal representative—Application for postponement of trial—Applicant must show cause—Court should not fetter its discretion by fixed rules—If an applicant has no other means of redress Native Appeal Court should grant relief—Successful applicant ordered to pay costs.

Appeal from the Court of the Native Commissioner, Willowvale.

Sleigh (President), delivering the judgment of the Court:

In this case the summons alleging adultery was served, appearance was entered, a plea was delivered and the attorneys for the parties agreed to set the case down for hearing on 15th March, 1949. The notice of set down was not delivered to defendant's attorney until

the date of the trial, but nothing turns on this point. On the day of the trial defendant was in default. His attorney applied for a postponement. This was refused. Plaintiff's wife then testified to the acts of adultery and after she had been cross-examined plaintiff closed his case. Defendant's attorney then applied for absolution judgment, this was also refused and the Assistant Native Commissioner then entered judgment for plaintiff " by default " as prayed with costs.

On 19th March application was made for rescission of the default judgment. It is clear from the supporting affidavit that defendant's default was not wilful, that is was reasonably occasioned and, from the plea, that he has a good defence.

The hearing of the application came before the Native Commissioner. It was not opposed, but the Native Commissioner *mero motu* raised the point whether the judgment was one which could be rescinded in terms of section 36 of Proclamation No. 145 of 1923. He held that is was a final judgment and dismissed the application with costs.

Defendant now appeals against the judgment of both judicial officers on the following grounds:—

1. That judgment on 15th March, 1949, is against the weight of the evidence.
2. That the said judgment is against the law, in that the judicial officer erred in refusing the application by defendant's attorney for a postponement to enable the defendant to appear.
3. That through the refusal of the application for postponement defendant has been substantially prejudiced.
4. That the Court on 31st March, 1949, erred in not granting the application for reopening of the case although defendant showed that his default was not wilful.

The contention in support of the first ground of appeal is that the wife's evidence is not corroborated, but this contention was abandoned after counsel's attention was drawn to the decision in Komani *v.* Tyesi [1 N.A.C. (S) 77].

Counsel rightly concedes that he is unable to support the fourth ground of appeal.

Rule 4 (2) of Order XXXII of Proclamation No. 145 of 1923 provides that if at the trial the defendant is in default judgment may be given against him with costs. It is not a judgment which may be entered by the Clerk of the Court, but it may be set aside if given in the absence of the party [see section 36 (1) of the Proclamation]. " Party ", however, for the purpose of appearance includes his legal representative [see definition in Rule 3 (1) Order I, also Dungane and Ano. *v.* Xesi 5 N.A.C. 143 and Labuschagne *v.* van Schalkwyk 1949 (1) P.H. F.34]. As defendant was represented by his attorney when judgment was given he was not in default and consequently the Native Commissioner had no jurisdiction to grant a rescission.

In regard to the appeal against the Assistant Native Commissioner's refusal to grant a postponement, it appears from the record that when the case was called defendant was in default. His attorney informed the Court that defendant had been advised of the date of the hearing and that he could not advance any excuse for his default.

The Assistant Native Commissioner's reason for refusing to grant the postponement is that the civil roll had become congested as a result of postponements due to the fact that parties were not ready to proceed with the cases on the days set down for trial, and that a warning had been issued that if parties found themselves unable to proceed with cases on the appointed days and did not notify the Court in time so that other cases could be set down, applications for postponement would not be granted except in exceptional circumstances. This Court appreciates and approves of the trial Court's efforts to dispose of cases as soon as possible. It is not in the interest of justice that cases should be allowed to drag on for long periods. But the grounds for applications for postponements must necessarily vary considerably. Each application must therefore be considered on its own merits. It is therefore unwise to lay down a general rule as to when applications would be granted. Such rule tends to fetter the Court's discretion. Had the matter rested there this Court would be entitled to say that the Assistant Native Commissioner, in considering the application, had acted upon wrong principles, because an applicant is not required to show " exceptional " grounds to justify his application. But it is clear that his decision would have been the same if he had acted on correct principles, because an applicant must at least show some grounds why the Court should exercise its discretion in his favour, and, admittedly, defendant had shown none.

It appears that defendant's attorney had given his client a slip of paper on which the date of the trial, namely 15th March, 1949, was written. When defendant did not appear his attorney was unable to contact him and he was thus in the unfortunate position of being unable to advance any excuse for defendant's default. In the circumstances it is to be doubted whether the Assistant Native Commissioner would have exercised a proper discretion, in view of the opposition, if he had granted the postponement. He cannot be expected to speculate on the many misfortunes which might have overtaken the defendant

on the day of the trial. The explanation for the default is simple. The defendant is unable to read and the person who read the slip for him told him that the case would be heard on 18th. Had this explanation been given at the time, it is probable that the application would have been granted, but in the absence of any explanation at all, defendant has not satisfied us that the Assistant Native Commissioner's decision is wrong.

It is a fundamental principle of judicial procedure that the Court must hear the other side. Defendant has not had an opportunity of placing his defence before the trial Court. It is true that plaintiff is in no way to be blamed for this, but if we were to dismiss the appeal, defendant will be without a remedy since this Court is virtually the highest Court within reach of native litigants. In Steyn v. Snyder (1913 A.D. 68) Lord de Villiers (C.J.) said, " I confess that if the petitioner was likely to be left entirely without remedy, I am not clear that some relief should not be granted ". That was an application for extension of time for noting an appeal. There the applicant had had a hearing. Those words apply with greater force where the applicant has had no such hearing. In Qina v. Qina [1939 N.A.C. (C. & O.) at page 44] McLoughlin (President) said, " It is in the interest of the state that there should be finality in litigation, but as a final Court of appeal, this Court must in the spirit of Section 15 of Act No. 38 of 1927, guard against barring its doors on technical grounds to any litigant who has suffered an injustice which he cannot redress in any other way and which in the opinion of the Court he has not acquiesced in or condoned ". With this we respectfully agree and come to the conclusion that this Court must grant relief if it is able to do so without causing substantial prejudice to plaintiff. Section 15 of the Act, referred to, confers on this Court very wide powers to correct any proceedings of a Native Commissioner's Court. It may, in fact, make any " order upon the case as the interest of justice may require ". These are discretionary powers which must be exercised judicially. We do not think that it could be contended that it would be an improper exercise of its powers if this Court affords defendant an opportunity of prosecuting his defence in the trial Court. The interest of justice demands it.

In coming to this conclusion we are satisfied that it will result in no prejudice to plaintiff. He did not oppose the application for rescission of the judgment and Mr. Wigley, who appears for him in this Court, makes it clear that he does not strenuously oppose the appeal provided his client is not mulcted in costs. This is reasonable because he could not abandon the judgment for, had he done so, judgment would have been entered against him with costs in terms of the Rules.

The appeal is consquently allowed, the judgment of the 15th March, 1949, is set aside and the record of proceedings is returned to the Court below for the hearing of such evidence as either party may wish to lead and for a fresh judgment. Appellant is ordered to pay all the wasted costs in the Court below as well as the Costs of this appeal.

For Appellant: Mr. Mahoud, Butterworth.

For Respondent: Mr. Wigley, Willowvale.

CASE No. 60.

KOROLWANA TANGANA v. NONDALANA MAKIKI.

BUTTERWORTH: 20th May, 1949. Before J. W. Sleigh, Esq., President, Elston and Rein, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Adultery—Damages—Unusual for adulterer's wife to act as go-between—Catch—Act of sending for another man's wife with object of clandestine meeting on the veld is, in native Law, regarded as a " catch "—Duress—Duress to force an admission must be of serious nature.

Appeal from the Court of the Native Commissioner, Kentani.

Sleigh (President), delivering the judgment of the Court:

This is an appeal against a judgment for plaintiff for 3 head of cattle or their value at £5 each and costs as damages for adultery. It is alleged in the particulars of claim that defendant admitted familiartiy with plaintiff's wife and offered three cattle as damages, but now refuses to deliver the cattle, offering in lieu thereof, £15 which plaintiff declines to accept.

Defendant denies the adultery and avers that he made the offers of the cattle and £15 under duress.

Nomisile, the wife, states that defendant's wife proposed love to her on behalf of defendant. This is very unusual but there are recorded cases where this had been done [see Busakwe v. Taliwe 1937 N.A.C. (C. & O.) 210]. Nomisile states that defendant had carnal connection with her at plaintiff's kraal, at the Kei and in Cebe location. Plaintiff's mother corroborates her evidence in regard to two occasions when she found defendant

with Nomisile at night in plaintiff's hut while plaintiff was away at work. This evidence was believed by the Acting Native Commissioner. We are not satisfied, much less convinced, that the Native Commissioner was wrong.

In regard to the allegation of duress, it appears from the record that Nomisile deserted plaintiff's kraal. He searched for her and found her at her people's kraal in Tutura location. While he was still at this kraal a little girl from a nearby kraal arrived and told Nomisile in the presence of plaintiff that a man wanted her. This was late in the afternoon. He accompanied the girl and when defendant saw him he got up and ran away. He was chased and caught after being struck down and he then admitted that Nomisile was his sweetheart. He does not deny this but he says that a rope was brought, and fearing that he would be tied up, made the admission and offered to pay the three cattle which did not belong to him. He admits that his object in sending for Nomisile was to make love to her. He, however, denies that he ever committed adultery with her.

His act in sending for another man's wife with the object of a clandestine meeting on the veld is, in native law, regarded as a " catch " and will support the woman's evidence of previous acts of adultery. It is true that specific acts of adultery must be proved but of this there is ample proof. His statement that the admission was made under duress is not borne out by his evidence. Duress in order to vitiate an admission against interest must be " of such a serious nature as to be calculated to effect and instil fear into a person of ordinary constancy and firmness of mind, for there is no excuse for groundless or foolish fears ". (Maasdorp's Institutes Vol. III 3rd Edition page 72). Where a person has been " caught " it is customary to tie his hands to prevent escape while his relatives and men are being called. If he does not attempt to escape he need fear no injury. The production of the rope was therefore insufficient to instil fear in the mind of a man of ordinary courage and we do not believe that defendant feared physical injury. He was detained at the sub-headman's kraal while his people were sent for, but this was after he had made the admission. Further he admits that he was very well treated and was free to move about the kraal. He further admits that he subsequently in the company of his own relatives went to plaintiff's attorney's office and offered to pay £15. It cannot possibly be contended that this offer was made under duress.

The facts in this case do not establish the defence of duress and, in any case, there is sufficient evidence, apart from the admission, to support the Native Commissioner's judgment.

The appeal is dismissed with costs.

For Appellant: Mr. Sparks, Butterworth.

For Respondent: Mr. Neethling, Kentani.

CASE No. 61.

MABIZA TSHALI *v.* MADOKOZA MBALI.

PORT ST. JOHNS: 1st June, 1949. Before J. W. Sleigh, Esq., President, Midgley and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Interpleader action—Registration of cattle is merely a compliance with dipping regulations and does not affect ownership—Action in effect a claim against deceased estate—Heavy onus on judgment creditor to prove his claim—Appeal on fact —When an appellate tribunal will interfere with trial Court's judgment.

Appeal from the Court of the Native Commissioner, Bizana.

Sleigh (President), delivering the judgment of the Court:

Mabiza Tshali *v.* Mandokoza Mbali No. 30/49.

Xonyeni Mbanjwa *v.* Mandokoza Mbali, No. 31/49.

These two interpleader actions were consolidated for the purpose of trial and are argued as one on appeal.

Respondent obtained judgment against Mdlodlo Nyama for a dark red ox and a black heifer or their value, £16. The first was attached in the possession of claimant Mabiza and the second in the possession of claimant Xonyeni. The Native Commissioner declared the cattle executable and claimants have appealed.

It is common cause that the cattle were paid by Mamjara to Nyama (the father of the judgment debtor) as a fine for the seduction and pregnancy of his daughter. Respondent's case is that Nyama owed him money and that on the day the cattle were delivered to Nyama the latter paid them to him in satisfaction of the debt. This is alleged to have taken place about September, 1948.

It is not disputed that in November, 1948, Nyama sold the cattle to the claimants. He died on 25th December, 1948, and on the following dipping day Mdlodlo authorised the transfer in the dipping register of the cattle to the claimants. Thereafter in January, 1949, respondent sued Mdlodlo for the cattle alleging that they had been paid to him by Nyama by " word of mouth ", and obtained a default judgment.

On appeal it is contended that the action against Mdlodlo was not a vindicatory action since at the time he was not in possession of the animals, and that therefore respondent had no right to attach cattle which were admittedly not the property of the judgment debtor. Reliance is placed on Maasdorp's Institutes Vol. II 5th Edition page 94. This point was not raised in the Court below and it is unecessary to decide whether this contention is well founded. We prefer to decided the case on the basis on which it was placed before the trial Court where the sole point for decision was whether the cattle were paid to respondent on the day they were delivered to Nyama, the onus being upon respondent.

It is not diputed that Nyama owed money to respondent. The amount is not certain. Respondent says it was £9. 8s. He states that Nyama sent for him and told him that he had received some money on account of the fine and asked him to be present the next day when Mamjara's messengers would be there; that he went to Nyama's kraal as requested with his brother, Mafuku, and a neighbour, Gontsha; and that after their arrival Mzakombele and Benoni (Mamjara's messengers) arrived with the two cattle and paid them to Nyama. He states further that Nyama then said to him " These are your cattle Mandokoza ", that he accepted them in satisfaction of his claim, that is was arranged that Mdlodlo, who was present, would transfer them to his name in the dipping books, and that the cattle were taken back to Mamjara's kraal by her messengers for that purpose. This evidence is corroborated by Mafuku and Gontsha.

Now, there is no doubt that, if this evidence is true, there was a valid delivery and that *dominium* in the cattle passed to Nyama and from him to respondent. Registration in respondent's name is merely a compliance with the dipping regulations and does not affect ownership [see Simanga v. Nkampule 1 N.A.C. (S) 75].

Respondent went on to say that the cattle were not transferred to him becuase it was stated by Nyama that Mdlodlo was away visiting his wife's people, that, when Nyama died he saw Mdlodlo who made the excuse that he was still mourning, that he then went to the dipping tank and found that the cattle were about to be ransferred to the claimants and that he then requested the dipping foreman not to agree to transfer these cattle to them.

Mamjara's messengers deny that respondent and his witnesses were present when they visited Nyama's kraal, They also deny that they drove the cattle. They state that they paid £10 in cash and the cattle by description and that these were driven the following day by the boys James and Kizana. The latter confirms this. The messengers state further that Bazanisa accompanied them. This man is not mentioned by respondent and his witnesses.

Now, the Native Commissioner has rejected the evidence of these two witnesses on the ground that they were shown in cross-examination not to be entirely disinterested. It is difficult to see in which way they can possibly be interested. They are not related to the parties. They acted for Mamjara in discharge of an obligation and after having paid the cattle to Nyama it could make no difference to them what he did with the cattle. It is true that their evidence is contradicted to some extent by the evidence of Mamjara, (a witness for claimants) who says in her evidence in chief—

> " I sent the cattle to Nyama's kraal with Beveni (Benoni), Nozakamba (Mzokambele), Mpayipeli (the seducer) and Buzanesi. They took money. They were not driving cattle. They took the money and paid the cattle, by word of mouth."

But under cross examination she says—

> " Benoni and Nozakamba drove the cattle to Nyama's kraal and brought the cattle back after they had been paid—the day after the money had been paid."

She thus seemingly corroborates the evidence of the respondent and his witnesses. It is unfortunate that she was not asked to explain these two inconsistent statements. There may be a good explanation as for instance that she was possibly confused by the manner in which the questions were put. We do not think that this inconsistency justifies the rejection of the evidence for claimants. She is undoubtedly a disinterested witness and it is improbable that she would deliberately make a false statement.

All claimant's witnesses who testify as to what took place at the dipping tank agree that respondent came to the tank and tried to prevent the transfer of the cattle to the claimants. They state that they then went to consult Mdlodlo at his kraal and that the latter told the foreman in the presence of respondent that the cattle must be transferred to claimants. Respondent denies that he was present. This statement is undoubtedly false

The dipping labourer is related to one of the claimants and his evidence may be biased but this can not be said of the dipping foreman who was at the time a comparative stranger to the area.

In accepting the evidence of respondent and his witnesses the Native Commissioner says that he was favourably impressed with their evidences and demeanour, but makes no comment on respondent's false statement that he did not go to Mdlodlo's kraal. As this evidence was deliberately false it is difficult to see how it could have been impressive. Further, the Native Commissioner says that Mdlodlo may have sold the cattle to the claimants. He overlooked the fact that it is not disputed that Nyama himself sold the cattle to them.

Respondent's action against Mdlodlo is in effect a claim against a deceased estate. According to his own valuation of the cattle his claim is in excess of the amount due to him by the estate. According to the evidence Nyama had sufficient cash in hand to pay the debt in full. The probability is therefore against the alleged payment of the cattle. There is thus a heavy onus upon respondent because, whichever way the cases go, the estate will remain indebted to one side or the other. It is therefore necessary to view with a suspicious eye the claim which is not supported by the deceased's representatives. On the other hand it must be borne in mind that a trial Court has advantages which an appellate tribunal cannot have and consequently the latter Court will be slow to interfere with the judgment of the trial Court in an appeal purely upon fact (Rex *v.* Dhlumayo and Ano., 1948 (2) S.A.L.R. at page 705). On page 706 of the report of that case (paragraph 10) it is said " There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such: there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities ". Now, the Native Commissioner's reasons are unsatisfactory. He has on insufficient grounds rejected the testimony of witnesses who could have no possible interest in the matter. He is under the mistaken impression that Mdlodlo had sold the cattle to the claimants and has ascribed to him a motive which he did not have for not transferring the cattle to respondent. He has also overlooked the improbability of Nyama's paying two cattle which respondent valued at £16 to settle a debt of £9. 8s. when according to the evidence he was in possession of sufficient cash to meet his liability; and finally he has accepted the evidence of respondent as truthful and reliable without attempting to explain the false testimony of this witness. Having regard to the heavy onus which rests on respondent we are convinced that the Native Commissioner could not reasonably have come to the conclusion that respondent had discharged that onus.

The appeal is allowed with costs and the judgment in the Court below in each case is altered to read—

" The beast is declared not executable with costs. "

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Stanford, Lusikisiki.

CASE No. 62.

PETELA ZABOBENI *v.* **BENNET NDUKU AND ANOTHER.**

PORT ST. JOHNS: 2nd June, 1949. Before J. W. Sleigh, Esq., President, Midgley and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Practise and procedure—Native custom—Seduction and pregnancy—Damages—Intercourse admitted but paternity denied—Right to claim damages not forfeited by giving girl in marriage before action instituted—This applies only where the pregnancy has been reported—Where man admits intercourse woman's oath as to paternity is preferred even though other men had connection with her.

Appeal from the Court of the Native Commissioner, Libode.

Sleigh (President), delivering the judgment of the Court:

This is an appeal against the judgment of absolution from the instance with costs in an action in which plaintiff claims nine head of cattle or their value, £45, as damages for seduction and pregnancy of his sister, Gretta, on two occasions by first defendant. Second defendant is sued in his capacity as kraalhead.

It is not diputed that about the beginning of 1946 Gretta was found to be pregnant. She blamed first defendant and was taken to his kraal where he admitted intercourse but denied that he was responsible for her condition and alledged that one Tulankomo had also been *metshaing* with her at the time. He paid a beast to await the birth of the child which event took place in July, 1946. About a month after her condition was discovered she

was given in marriage to one Sityutu, who paid eight cattle as dowry, but the marriage only lasted a week when she deserted him and the marriage was dissolved by the return of the dowry.

In the Court below, according to the Native Commissioner's reasons, plaintiff's attorney seems to have accepted the position that plaintiff forfeited his right of action by giving the girl in marriage to Sityutu, and this is what the Native Commissioner held. This finding on the question of custom is in conflict with this Court's decisions in Somdaka *v.* Tshemese (1 N.A.C. 146); Mtyana and Moni *v.* Ntika (5 N.A.C. 155) and Gebeleiseni *v.* Sakumani [1947 N.A.C. (C. & O.) 105]. In these cases it was held that when once action had been taken by the customary report of the pregnancy to the seducer, the father of the girl did not forfeit his right of action by giving the girl in marriage to some other person.

These cases do not emanate from Pondoland districts and therefore, at the request of counsel the question was referred to the native assessors. A record of their opinions is annexed. They state at first that the right of action is forfeited by the marriage of the girl, but subsequently qualify this statement by saying that if the man admits paternity but has no stock the fine can be recovered by action after marriage. This qualification begs the question. If the intervening act of marriage bars the action a plaintiff would be non-suited, and this is inconsistent with the expression of opinion that he could sue if paternity was admitted.

It is clear that the assessors are confusing the question of proof with the question of limitation of action, as did the native assessors in the case of Ngesi *v.* Mcuta and Ano. [1 N.A.C. (S) 1]. A man may deny paternity but there may be conclusive proof that he is the father of the child. Must the plaintiff delay the pending marriage until judgment has been given? This is unnecessary from a procedural point of view, and it is not in the interest of public policy to delay it. There might be much to be said for the assessor's opinion if the action were brought under common law, because under that law it is the girl who sues and she is entitled to compensation for loss of her maidenhood and for her impaired marriage prospects. But in an action under native law it is the girl's guardian who has been wronged and he is entitled to be compensated for the reduced lobolo value of his ward. It is most improbable that any man marrying a girl who is a *dikazi* would be prepared to pay a full dowry for her. The presumption is therefore that the guardian would in any case suffer loss and it is unjust to deny him the right to institute an action for compensation merely because he has given the girl in marriage to some other man.

We therefore come to the conclusion that an action to recover a fine for pregnancy is not barred by the marriage of the girl, but we must emphasise that this applies only where the pregnancy has been reported to the seducer to give him an opportunity of offering marriage, before the girl is given in marriage to some one else.

In regard to the first pregnancy first defendant admits that he may be the father of the child. His only ground for denying paternity is because Tulankomo also had intercourse with Gretta about the time she conceived. She admits carnal connection with Tulankomo but states that the last time she had intercourse with him was about a month before she became pregnant and that she had her monthly periods after that event. She states that first defendant is the father of her child.

Where a defendant admits intercourse but denies paternity the oath of the woman is generally preferred even though it is proved that other men have had connection with her (Sontundu *v.* Damane and Ano. 3 N.A.C. 261; and Macdonald *v.* Stander 1935 A.D. 325) unless the Court is of the opinion that the woman is generally unworthy of belief (Roussouw *v.* Chetty 1939 E.D.L. 277), or unless there is proof that the defendant could not have been the father (de Witt *v.* Uys 1913 C.P.D. 653). Unfortunately the Native Commissioner does not comment on the demeanour of Gretta. It is true that she at first denies that she had carnal intercourse with any other man except her husband, Sityutu, but under cross-examination she admits her relations with Tulankomo. It appears from the record that she made this admission freely when the direct question was put to her. We would not therefore by justified in holding that she tried to mislead the Court on this point.

Then she says that she had never seen Sityutu before her marriage to him, whereas her witnesses Pantsigwelanga and Esther say that she knew him and that he often came to plaintiff's kraal. It is difficult to understand why she denied having seen him. It is possible that she was merely denying having had intercourse with him prior to her marriage. Be that as it may, there is the fact that the child was born in July, 1946, and defendants never tried to recover the beast which was paid pending the birth of the child and they have not counterclaimed in the action. In all the circumstances we are not prepared to say that Gretta is generally unworthy of credence. We accept her evidence that first defendant is the father of the first child and consequently plaintiff is entitled to recover the balance of the fine in respect of that child.

In regard to the second pregnancy Gretta says that after her marriage to Sityutu had been dissolved first defendant again became friendly with her but, because she had a baby he did not have intercourse with her until green mealie season, 1948. In support of her statement she produced an undated love letter (Exhibit C) which she says was received about three weeks after she had left her husband, and she called Esther who states that she made an appointment for them at the request of first defendant during green mealie season, 1948.

First defendant admits that he wrote the letter but says that is was written before she became pregnant the first time. This evidence is accepted as this letter as well as the other letters produced were apparently delivered by hand and plaintiff has not called the person who delivered them. Then again if they had become friendly as a result of this letter there was no reason why he should not have had carnal relations with her before the birth of the first child which event took place about three or four months after she had left her husband.

He states that he did not see or speak to her after her marriage. This may be possible but improbable since Gretta says they do not live far apart. Then he does not specifically deny the evidence of Esther in regard to the appointment. In these two respects his evidence is unsatisfactory, but as Esther never saw them together and as the Native Commissioner, who had the advantage of seeing and hearing defendant, states that he gave his evidence in an honest and straightforward manner, this Court is not convinced that the judgment in respect of this claim is wrong.

The appeal is allowed with costs and the judgment of the Court below is altered to read—

" For plaintiff for four head of cattle or their value, £20, and costs. Absolution from the instance with costs as to the balance of the claim. "

NATIVE ASSESSOR'S OPINIONS.

Names of Assesors: Lumayi Langa (Flagstaff), Tolikana Mangala (Libode), Ndabuka Cetywayo (Lusikisiki), Madlanya Tantsi (Tabankulu) and Sinyokobede Ndevu (Port St. Johns).

Question: A girl accuses a man of having caused her pregnancy. He and another man were having intercourse with her about the time she conceived. The first man pays a beast to await the birth of the child. Before such birth the girls is given in marriage to a third man. Does the father forfeit his right of action against the first man by giving the girl in marriage?

Answer (per Tolikana Mangala): The father forfeits his rights to sue the first man because the latter had paid a beast to await the birth of the child and he was not shown the child.

Question: What would have been the position if no beast had been paid ?

Answer (per Tolikana Mangala): The father could not recover the fine.

Question: What would be the position if the man admitted that he was the father of the child, but the girl was given in marriage before the fine was paid ?

Answer (per Lumayi Langa): He cannot recover the fine.

Question: Can the natural father subsequently claim the child if he pays the fine ?

Answer (per Lumayi Langa): No.

Question: To whom would the child belong ?

Answer (per Tolikana Mangala): To the father of the girl.

Question: Does it make any difference if the husband was aware of the pregnancy at the time of the marriage ?

Answer (per Tolikana Mangala): The child would belong to the girl's father. If the husband did not know of the pregnancy before the marriage the child would belong to him.

Question: Does it make any difference to the father's right to recover the fine if the union is dissolved before the birth of the child?

Answer (per Madlanya Tantsi): No. He cannot recover the fine.

Question: If action had been taken by making the customary report of the seduction, has the father's right to recover damages not been established, even though the girl be subsequently given in marriage ?

Answer (per Tolikana Mangala): We do not agree that a case is kept alive by " taking action " in the matter.

Question: If the seducer admits liability, but says he has no cattle and is prepared to go to work in order to pay the debt, does the father lose his right to the fine if he gives his daughter in marriage to some other man before the fine is paid ?

Answer (per Tolikana Mangala): No. The father does not lose his rights because of the poverty of the seducer. If he does give his daughter to some one else in marriage in these circumstances he may still recover the fine from the seducer when the latter is able to pay.

All the assessors agree with all these expressions of opinion.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Stanford, Lusikisiki.

CASE No. 63.

HLUKENISA DJERMAN *v.* JIM MORRIS AND ANOTHER.

KOKSTAD: 9th June, 1949. Before J. W. Sleigh, Esq., President, Warner and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Succession—Estate—Heritable rights of illegitimate children of widow—Among Sutu-Chwana tribes and Nguni tribes not practising ngena *child born to a widow at deceased husband's kraal has normal heritable rights—Among Nguni tribes practising* ngena *illegitimate child of widow does not inherit husband's estate—Parties Pondomisi practising* ngena*—Appellant son of a stranger cannot succeed.*

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:

The facts in this case are not disputed. Gogo, who lived at the kraal of his eldest brother, Mabelene (2nd defendant) married Noquite according to native custom. He died leaving two daughters, namely, Noziga and Nomalanga. Some years after Gogo's death Mabelene gave Noquite permission to go to work. She took Nomalanga with her. On her return she lived, with Mabelene's permission, at the kraal of her brother, Jim (1st defendant). Here she was joined by Noziga. While at Jim's kraal she was rendered pregnant by Griffiths Kaalpens and went to live at his kraal, leaving her two daughters at Jim's kraal. At Griffiths' kraal where she still resides, she gave birth first to a daughter and then to plaintiff. Nomalanga has married and her dowry is in the possession of Jim who lays no claim to it. The dowry paid by Gogo for Noquite has not been returned to his heirs.

Plaintiff now claims that he is the heir of Gogo and is entitled to Nomalanga's dowry. Plaintiff and second defendant belong to the Pondomisi tribe and consequently the case must be decided according to the customs of that tribe.

The Assistant Native Commissioner ruled that second defendant is the heir of the late Gogo and dismissed palintiff's claim with costs. From this decision plaintiff has appealed.

In Madyibi *v.* Nguva [1944 N.A.C. (C. & O.) 36], McLoughlin (President), in discussing heritable rights of adulterine children, divides the tribes in South Africa into three groups. The first is the tribes of the Sutu-Chwana group which still retains strong traces of matrilineal descent and which allows considerable latitude in paternity. Among this group according to Schapera (Tswana Law and Custom page 170) a child born of adulterous intercourse belongs to its mother's husband who will look upon it as his own, and it will inherit from him in due course unless he has repudiated the child.

The second group is the Nguni tribes practising *ukungena*. This group is the most rigid observer of the practice of patriliny and demands that the heir shall be "of the body and of the blood" of the husband of the woman or, on his death of the *ngena* husband who in turn must be a particular member of the family specifically designated as husband by the elders of the family. (Manyosine *v.* Nonkanyezi 1 N.A.C. 114). Children of the woman as a result of any other intercourse rank as members of the husband's family but have no heritable rights.

The third group is the Ngunu tribes which do not practise *ukungena*. This group falls between the two extremes. An adulterine child, unless repudiated by the husband, will succeed to its mother's house property in the absence of any legitimate male children of its mother. (Madyibi's case *supra*.)

McLoughlin (President) was dealing only with adulterine children. What are the heritable rights of the illegitimate children of a widow whose dowry has not been returned ? In passing, I should mention that I do not regard the wife of an *ngena* union as a widow. Illegal intercourse with her is regarded as adultery and a fine can be recovered from the adulterer. (Mdoda *v.* Skeyi 3 N.A.C. 287.) Her children by her *ngena* husband are in native law not illegitimate and are in a strong position as they may be, and generally are, senior in rank to their natural father, the *ngena* husband.

Among the first and third groups the illegitimate child of a widow born at the kraal of her late husband, or at the kraal of her father-in-law, or at a kraal approved of by her husband's relatives, is regarded as the off-spring of her deceased husband and it has normal heritable rights. [Schapera's Tswana Law and Custom page 171: Gade *v* Gqaggeni, 1944 N.A.C. (C. & O.) 85]. If the widow had returned to her parents' kraal without the consent of her husband's relatives and there gave birth to an illegitimate child it belongs to her late husband's family but does not succeed to its mother's house property (Tyali *v.* Dalibongo [1942 N.A.C. C. & O.) 58].

Among the second group the illegitimate child of a widow belongs to the deceased husband's family. To this rule there is an exception among the Pondos. It has been held in a number of cases (see e.g. Mcitwa *v.* Ndondo [1944 N.A.C. (C. & O.) 96] that the illegitimate child of a widow born after she had become a *dikazi* belongs to her father, but can be aquired by her husband's heir by paying further dowry. However, an illegitimate child of such group whether born at the deceased husband's kraal or at any other place does not inherit the husband's estate [Vapi and Ano. *v.* Vapi, 1933 N.A.C. (C. & O.) 75; Nomtinteka *v.* Makonza, 5 N.A.C. 167; Mlahlwa *v.* Maqayise, 1945 N.A.C. (C. & O.) 81].

In Vapi's case the parties were also Pondomisi. In that case the widow of the great house gave birth to a posthumous illegitimate child at the great kraal. It was held that the heir of the right hand house was also heir of the great house. The facts in that case are somewhat different from those in the present case. There the legitimate heir was a direct descendant and the illegitimate child was born at the kraal of the deceased husband; in the present case the legitimate heir is a collateral and the illegitimate child was born at the kraal of its natural father, a stranger. But these differences do not affect the law on the point, because the Pondomisi tribe belongs to the group which practises *ngena* and this group demand that the heir shall be of the blood of the deceased husband. Plaintiff is therefore not the heir. In fact he would not have been the heir even if he belonged to the tribe which does not practise *ngena* because he was conceived and born at the kraal of a stranger.

The appeal is dismissed with costs.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 64.

VOORSLAG BUBI *v.* NTONINTSHI GEBENGA.

KOKSTAD: 13th June, 1949. Before J. W. Sleigh, Esq., President, Warner and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Practise and Procedure—Rescission of default judgment—Order rescinding default judgment not appealable—Defendant satisfying default judgment under pressure not precluded from applying for rescission—No review procedure—Non-appealable orders may be taken on appeal in conjunction with appeal against final judgment.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:

In the summons appellant claims from respondent the return of his customary wife and his four children, or, failing that, restoration of the dowry paid for her, namely eight head of cattle. Personal service of the summons was effected. Respondent failed to enter appearance and about three months later, namely, on 22nd June, 1948, default judgment was granted against him in the following terms:—

> " Default judgment granted as prayed with costs. Wife and children to return to plaintiff on or before 24th July, 1948, failing which the return to plaintiff of eight head of cattle or their alternative value reckoned at £5 each and costs of suit."

The wife and children were not returned as ordered by the Court, and on 12th August, 1948, a writ was issued in respect of the cattle or their value. The writ was executed on 16th August when respondent paid to the Messenger the sum of £47. 9s. 7d. being the alternative value of the cattle, and the costs. On 22nd October, application was made for rescission of the default judgment, for setting aside the writ and the attachment, and for extention of time within which the application should have been filed. On 11th November, 1948, appellant abandoned the judgment in respect of the particular portion regarding the return to him of his four children.

The application came before the Court on 1st December, 1948, when the Assistant Native Commissioner granted the application, extended the time and ordered respondent to pay the costs of the application, as well as the wasted costs. Against this order appellant (plaintiff) has appealed. Briefly the grounds of appeal are that the application should not

have been granted because (1) respondent was in wilful default, (2) since the application was made more than a month after the judgment had come to repondent's notice, he should have applied for extention of time in terms of Rule 2 (1) of Order XXXII of Proclamation No. 145 of 1923 before applying for rescission of the judgment, and (3) by satisfying the judgment, respondent is barred and estopped in law from making the application.

Respondent now objects *in limine* to the hearing of the appeal on the ground that the order rescinding the default judgment is interlocutory and not appealable.

In Nkwenkwana *v.* Lizo 1947 N.A.C. (C. & O.) 115], this Court held that an order rescinding a default judgment is not appealable. It relied on the decisions in Gatebe *v.* Gatebe (1928 O.P.D. 145); Keolzer *v.* Rosemann (1924 S.W.A. 98), and Ranchod *v.* Lalloo (1924 T.P.D. 211). The full reports of these cases are unfortunately not available, but it is clear that in these cases the Courts went no further than interpreting the statutory provisions that an appeal lies against " any rule or order . . . having the effect of a final and definitive sentence, including an order as to costs (Section 80, Act 32 of 1917). In Nkwenkwana's case this Court assumed that section 73 of Proclamation No. 145 of 1923, was part of the rules for Native Commissioner's Courts in the Transkei, but, on further consideration, it is found that this is not so. Proclamation No. 299 of 1928 provides that the procedure and rules contained in Proclamation No. 145 of 1923 shall be deemed to apply to Native Commissioners Courts in the Transkei, but section 73 of this Proclamation is not part of the rules and does not prescribe any procedure. It merely prescribes the kinds of judgments which are appealable. Neither the Native Administration Act (No. 38 of 1927) nor the Rules of this Court state specifically what judgments are appealable. We must therefore look to the established procedure of other Courts in South Africa for guidance.

In Pretoria Garrison Institutes *v.* Danish Variety Products (Pty.) Ltd., [1948 (1) S.A.L.R. 839] Watermeyer, C. J., in tracing the history of the appealability from interlocutory orders, states (at page 856) that the Italian school eventually formulated the general rule " that an appeal from an interlocutory order, before the final order, was only allowed if the aggrieved party would suffer a *gravamen irreparabile* by the provisional carrying out of the interlocutory order ". He goes on to say that the views of the Italian school were adopted by the Roman-Dutch writers and quotes Caroli as follows: " Thans nog een enkel woord over het recht van hooger beroep. Op dit stuk heeft het Oud-Hollandsch recht zich geheel aan de vreemde leer gehouden: geen appèl behalve wanneer het *gravamen irreparabile in definitiva* is. De schrijwers verwijzen te dezen aanzien naar verschillende beslissingen der Staten van Holland o.a. van 19 Maart 1622 ". The learned Chief Justice points out that when the commentators came to define what was meant by *gravamen irreparabile* they encountered difficulties.

In dealing with the revocability of interlocutory orders by the Court *a quo* the learned Chief Justice says (on page 857). " The Italian commentators divided them into two categories: (1) *interlocutoriae habentes vim definitivae*: and (2) *interlocutoriae simplices* the first of which could not be revoked or reconsidered by the Court pronouncing them and the second of which could." And on page 858 " one thing is clear, the division into the two categories . . . was made for the purpose of distinguishing revocable from irrevocable orders and was not made for the purpose of defining those which are appealable. Even if they were *simplex* they were appealable when they caused a grievance which could not be redressed in the final judgment in the case, or according to some commentators, on appeal from such final judgment ". And at page 861 " It would seem that statutes (as for example section 80 of Act 32 of 1927) which adopted, as the test of appealability, the old Roman Law test for revocability (viz. did the order have the effect of a final and definitive sentence), instead of the Roman-Dutch test for appealability (viz. did the order cause a *gravamen irreparabile*), either intentionally, or inadvertently, closed a gap which might otherwise have existed and left no category of orders which were neither revocable by the Court which made them nor subject to correction by appeal to a higher Court ".

Now, as far as I can ascertain the Roman-Dutch test of appealability has never been adopted in South Africa. We must therefore conclude that it has fallen into disuse. Apart from this, if we were now to apply this test the result would be that the gap to which the learned Chief Justice referred would remain and the result might be that the jurisdiction of a trial Court to rescind or vary its own judgment in respect of which no appeal lies, would be seriously restricted. In our judgment, therefore, we should without hesitation adopt, as the test of appealability, the Roman Law test of revocability. That is we should apply the provisions of section 73 of the Proclamation as if it were embodied in the Native Commissioner's Court Rules.

So applied, we have a wealth of judicial precedence and text books to guide us. In the Pretoria Garrison Institutes case *supra* Schreiner J. A. at page 870 says " The principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such at to ' dispose of any issue or any portion of the issue in the main action or suit ' or, which amounts I think, to the same thing, unless it ' irreparably

anticipates or precludes some of the relief which would or might be given at the hearing'. The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit."

Now, the order of rescission of the default judgment does not dispose of any issue in the main action, nor does it have any direct bearing on the issue. It merely restores the *status quo ante* so that the trial Court can go into the merits of the case. Undoubtedly the appellant has the inconvenience of having a judgment in his favour set aside but respondent was ordered to purge his default by paying the costs of the application as well as the wasted costs in which is included the costs of execution. Appellant is therefore in no worse position than he would have been if there had been no default.

It is, however, strongly contended that by satisfying the judgment debt the respondent is pre-empted from asking the Court to re-open the proceedings. We do not agree with this contention. It may well be that where a defendant has accepted a default judgment as correct and satisfied it or offered to liquidate the debt he may be estopped from asking the Court to reopen the case, but where he is confronted with a writ and decides to save his property by paying the debt such payment does not preclude him from applying for rescission. The test is not whether he paid the debt but whether he accepted the default judgment as correct and this must be conclusively proved.

It is further contended that if the rescission order were to stand, appellant would be precluded from raising the question of estoppel at the trial. Counsel are also agreed that the Native Commissioner's order rescinding the default judgment cannot be taken on appeal in conjunction with an appeal against the judgment on the main issue.

We do not accept these arguments. We consider that the object of section 73 (*b*) is to suspend interim appeals against preparatory or procedural orders, which do not have the effect of a final and definitive sentence, until the case is finally decided.

It is true that in the Superior Courts of South Africa a non-appealable order may be set aside on review, if it was grossly irregular (Tshungulwana *v.* Brownlee N.O. and Mtulo Mnamckwana, 1911 E.D.L. 136), but since this Court has no review procedure, an irregularity in the proceedings must of necessity be brought before it by way of appeal.

We come to the conclusion that the Assistant Native Commissioner's order rescinding the default judgment is not appealable at this stage of the proceedings. The objection is therefore sustained, the appeal is struck off the roll with costs and the record of proceedings is returned to the Court below for further hearing.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 65.

SIBUZI MPIKWA *v.* KULUMELOKWAKE MAQAYEKANA.

KOKSTAD: 13th June, 1949. Before J. W. Sleigh, Esq., President, Warner and Cockcroft, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Dowry—Refund of—Commoner liable to refund cattle borrowed for purpose of paying dowry—Allegation that the cattle were a gift must be proved.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President), delivering the judgment of the Court:

It is alleged in the particulars of claim that when defendant married his first wife, a daughter of a Chief in Natal, he had to pay a substantial dowry and borrowed six cattle from plaintiff's late father, Mpikwa, and promised to replace the cattle; that at the wedding he also borrowed 3 sheep and a goat for slaughter purposes and promised to replace these; that after Mpikwa's death defendant paid plaintiff the sum of £9 representing one beast and four small stock. Plaintiff, as heir of Mpikwa, claims payment of the balance of the loan, viz., five head of cattle or their value, £25.

Defendant admits that the late Mpikwa contributed six head of cattle towards the dowry of his first wife, but avers that he is the Chief of the Amasami clan, that he was a minor when his father died, that Mpikwa was his guardian, and that the latter collected the dowry for his first wife from the whole clan, Mpikwa himself contributing the six cattle. He denies that he borrowed these cattle which, he says, were an out and out gift made about 10 years ago and no refund has ever been claimed. He further denies that he paid £9 to plaintiff.

In a counterclaim defendant claims the sum of £35 with interest at the rate of six per cent. from 1st September, 1946, and alleges that in that month plaintiff borrowed £35 from him to satisfy a judgment debt and pledged with defendant (plaintiff in reconvention) seven head of cattle as security.

Plaintiff in his reply to the plea and in his plea to the counterclaim admits that Mpikwa acted as guardian for defendant but denies that the latter is a chief. He avers that Mpikwa sued defendant in the Native Commissioner's Court for refund of his contribution but owing to his death the action was withdrawn. He admits that he had an unsatisfied judgment against him but denies that he obtained a loan from defendant or pledged cattle to him.

After hearing evidence from both sides the Assistant Native Commissioner found that the contribution of six cattle by the late Mpikwa towards the dowry of defendant's wife was a gift and entered judgment for defendant with costs on the claim in convention. On the counterclaim he found that defendant (plaintiff in reconvention) had lent plaintiff £35, but illogically, entered a judgment of absolution from the instance with costs because defendant had not proved his claim.

Plaintiff now appeals against the judgment on the claim in convention and defendant has cross-appealed from the judgment on the counterclaim.

Since the contributions of six cattle by Mpikwa is admitted the onus is on defendant to prove that it was a gift.

It is established native custom that when a chief of a tribe marries his " royal " wife, the mother of the tribe, her dowry is paid by the tribe and the contributors to the dowry have no legal right to a refund (Nobumba *v.* Mfecane, 2 N.A.C. 104). When, however, contributions are made to the dowry of a man by his relatives or friends (the Ukukwenzelele custom) the contributions can be recovered by action at law, but usually no claim for refund is made until dowry is received for the daughter of the wife married [Molo N.O. *v.* Gaga, 1947 N.A.C. (C. & O.) 80].

It is common cause that about fifty years ago Umvovo, the grandfather of the parties, came from Natal with relatives and bought certain farms in Umzimkulu district. Umvovo was the head of the Amasami clan belonging to the Hlangweni tribe. There is no evidence that unrelated natives accompanied Umvovo. In fact all the evidence goes to show that it was the family which migrated to Umzimkulu. Defendant is the present head of the family. At the time of his marriage some of the relatives had left the farms, but those who remained recognised defendant as head. After his marriage he claimed rent from those who remained. They refused to pay and this led to litigation. To-day the family is split and I gather from the record that the feeling between defendant and his relatives is strained. It is against this back-ground that the case must be considered.

There is not a tittle of evidence that Umvovo was related to the ruling house of the Hlangweni tribe, but even if he were, the most that he could claim was that he was the head of the clan which was left behind in Natal, and defendant is in no better position.

Now, it does sometimes happen that members of a clan pay the dowry of the first wife of its head—see for instance Dyosini *v.* Bekwa [1933 N.A.C. (C. & O.) 47], but one would expect that when this was proposed the blessing of the head of the tribe would have been obtained. There is no evidence that Tshayisandla, whom defendant recognises as his chief, was notified. On the contrary it is clear that the marriage of defendant was purely a family affair because according to his own evidence the people who assisted him with his dowry are all his close relatives—uncles and cousins. In these circumstances he cannot claim that the dowry was paid by the clan.

Plaintiff and his witnesses state that Mpikwa stipulated for a refund. Defendant and his witnesses say that there was no question of replacing the cattle contributed by the relatives, and in support of this, evidence was led to prove that defendant had sufficient cattle to pay dowry without any assistance from his relatives. This suggested inference overlooks the traditional unity of native family groups. It does not matter how many cattle a bridegroom may have; it is customary for members of the family to contribute towards the dowry of the bride, because she is regarded as a wife of the family. They refer to her as " our wife " and expect to share in the distribution of the dowries of her daughters. Hence the custom that refund of contributions has to be made. It frequently happens that refund is never claimed and this has led to the belief that the contribution is a gift. It is not, and if refund cannot be made out of the dowries of daughters the husband is expected to discharge his obligation out of other assets (see Molo's case *supra*).

In the present case defendant has failed to prove that the contribution made by Mpikwa was a gift and the appeal consequently succeeds.

In regard to the counterclaim defendant states that he gave plaintiff a cheque for £35 payable to cash, and his evidence is supported by his younger brother, Bhekukufa. The Assistant Native Commissioner accepted this evidence. In that case he should have given judgment for the defendant. However, at that time plaintiff and defendant were on bad

terms. The latter had driven plaintiff off the farm. It is therefore most improbable that defendant would have advanced the money to plaintiff and even if he did he would not have allowed the cattle which, he says, were pledged to him as security to leave his possession. He has not produced the best evidence to support his statement, that is, the cashed cheque or the counterfoil. He says that these were destroyed, but a bank statement that a cheque for £35 was cashed in September, 1946, would have supported his evidence.

Plaintiff states that he borrowed £18 from Beji—since deceased, and had £17 of his own and paid the judgment debts with these amounts. Although his evidence is uncorroborated it is sufficient to rebut defendant's evidence of the loan. The cross-appeal consequently fails.

The appeal is allowed with costs and the judgment on the claim in convention is altered to one for plaintiff as prayed with costs. The cross-appeal is dismissed with costs.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 66.

MAGINGI NONDALA GCANGA *v.* VELEKO GCANGA AND ANOTHER.

UMTATA: 20th June, 1949. Before J. W. Sleigh, Esq., President, Bates and Cornell, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Marriage by native custom—Ranking of wives——Commoner—Departure from customary order of ranking permissible—Overwhelming proof that status publicly declared at wedding—Status of wife previously married may not be altered.

Appeal from the Court of the Native Commissioner, Engcobo.

Sleigh (President), delivering the judgment of the Court:

The late Nondala Gcanga, registered owner of Garden Lot No. 132, Location No. 18, Ngqaba, in the district of Engcobo, married four wives according to native custom in the following order, viz. (1) Nosayiti, (2) Nosayini, (3) Nosayisi and (4) Nomayiti. The first died without male issue, the second is alive, is the registered owner of Garden Lot No. 19 and has a son, Mangingi; the third has absconded and has no male issue, and the fourth is alive, lives at the great kraal of Nondala and has a son, Bapepi.

According to the customary order of ranking of wives among the tribe to which Nondala belongs the first wife married is the great wife, the next is the right-hand wife, the third is the *qadi* to the great house, the fourth is the *qadi* to the right-hand house, and so on. In applying this order Nomayiti would be the *qadi* to Nosayini, and since the wives of the great house of Nondala have no male issue, Mangingi would be his heir in that house and succeed to Lot No. 132; but it is alledged that Nomayiti was married as substitute for or in the place of Nosayisi and consequently she is entitled to the use and occupation of Lot No. 132. It is not expressly so stated in the record before us, but it is clear that the purpose of the enquiry held by the Acting Native Commissioner was to dertermine this point. The Acting Native Commissioner, after hearing evidence, held, that Nomayiti was married as *qadi* to the great house following the desertion of Nosayisi. Against this finding Mangingi has appealed.

The first point for decision, a point which the Native Commissioner did not decide, is whether it was competent for Nondala to marry a second *qadi* for the great house before a *qadi* had been provided for his right hand house.

It has been laid down in a number of cases that among commoners the rank and status of the wives of a man follow in the order of their priority in marriage and once their order of precedence has been established it may not thereafter be altered [see, e.g., Yoywana *v.* Yoywana, 3 N.A.C. 301; Dyosini *v.* Bekwa, 1933 N.A.C. (C. & O.) 47]. There are a number of cases in which a commoner or a petty chief has nominated the status of a wife at the time of her marriage, which nomination had the effect of altering the status of another wife previously married, but this Court has consistently refused to recognize as valid such nomination as the effect of it is to disinherit the heir who would ordinarily have succeeded [see Masipula *v.* Masipula, 4 N.A.C. 373; Poto *v.* Costa, 1931 N.A.C. (C. & O.) 38; and Dyosini's case *supra*].

In certain circumstances, however, a commoner may declare the status of a wife, thus resulting in a depature from the customary order of ranking of wives. He may, for instance, marry a seed-bearer [Dumalisile *v*, Dumalisile, 1 N.A.C. (S) 7], and he may marry a *qadi* in the right-hand house before a *qadi* has been provided for the great house (Mgudhlwa *v.* Paliso, 4 N.A.C. 378). But whenever it is alleged that a wife had been given a rank at variance with the customary order of ranking of wives, there must be overwhelming proo

that the rank of the wife was publicly declared at the wedding ceremony, and further the rank so assigned to the wife must not have the effect of altering the status of other wives already married.

The evidence goes to show that some four years after Nosayisi had absconded Nondala expressed a wish to marry another woman in her place. The object of marrying another woman in the great house is obvious and reasonable. It was important that there should be an heir in that house and there was none. Nosayisi had absconded and Nosayiti, to whom Nondala had been married about 30 years or more, had produced no children. Nondala then sent Veleko to ask for Nomayiti in marriage and paid dowry for her, part of which came from the right-hand house. At the wedding ceremony she was publicly declared a *qadi* to the great house. All the senior members of Nondala's family say so and their testimony is supported by the facts that Nomayiti remained at the great kraal when a separate kraal for the right-hand house was established, that Mangingi handed over the great house property to her after Nondala's death and that he then claimed refund of cattle borrowed from the right-hand house to pay dowry for Nomayiti, steps which he would not have taken if Nomayiti was a *qadi* to his mother's house.

Against this evidence there is the testimony of Mangingi, his wife, his mother and of one Velile who appears to be unrelated to the family. They state that Nondala intended to *putuma* Nosayisi. This is denied by the other side and the fact that she left his kraal about 20 years before his death supports the denial. Their statement that Nomayiti remained at the great kraal to look after the mealie pits is unconvincing. They were not questioned about the division of the estate property after Nondala's death, but it is clear from Mangingi's cross-examination of the witnesses that he admits the division. In our opinion the evidence overwhelmingly supports the Native Commissioner's finding. The appeal is consequently dismissed with costs.

For Appellant: Mr. Chisholm, Umtata.

For Respondent: Mr. Airey, Umtata.

CASE No. 67.

QASHANI TONYA *v.* MPAMBO MATOMANE.

UMTATA: 21st June, 1949. Before J. W. Sleigh, Esq., President, Bates and Cornell, Members of the Court (Southern Division).

*Native Appeal Case—Appeal—Grounds of appeal must be clearly and specifically stated—Native custom—Dowry—Balance of—Agreement to pay a specific number of cattle—No action on agreement when native custom provides own procedure for recovery of—*Ukuteleka *custom must be invoked—Recovery of dowry when parties married according to Christian rites distinguished—Action for delivery of cattle paid by description can be maintained.*

Appeal from the Court of the Native Commissioner, Umtata.

Sleigh (President), delivering the judgment of the Court:

It is alleged in the particulars of claim that about 23 years ago defendant agreed to pay the plaintiff's late father twelve specific cattle as dowry for plaintiff's sister, that six head of the cattle have been paid and that defendant refuses to pay the remaining six cattle or their value, £30. Although it is alleged that defendant agreed to pay specific cattle we are informed by Counsel for appellant (plaintiff) that he is relying on an agreement to pay a specific number of cattle.

Defendant in his plea denies that he promised to pay 12 head of cattle. He avers tha he married plaintiff's sister 27 years ago and paid the equivalent of 9 head of cattle as dowry. He pleads further that the parties are Tembus practising the custom of *teleka* and accordingly plaintiff has no right to sue for dowry.

The Additional Native Commissioner upheld the special plea and dismissed the summons with costs. From this judgment plaintiff appeals on the ground that it " is wrong in law and contrary to custom ".

Section 10 (*b*) of the Native Appeal Court Rules provides that a party noting an appeal shall state the grounds of appeal clearly and specifically. It is therefore not sufficient to state that a judgment is contrary to custom. Counsel for appellant has, however, been given leave to amplify the ground of appeal by adding the following words, viz., " in that the Native Commissioner erred in holding that plaintiff is not entitled to sue for the recovery of the specific number of dowry cattle agreed upon ".

It is not expressly denied that the parties are Tembus. At any rate they reside in a district inhabited by Tembus. Further it is not disputed that the Tembu tribe practise the *ukuteleka* custom and that defendant married plaintiff's sister according to native custom. It is, however, contended that since defendant undertook to pay a specific number of cattle he is bound by that undertaking, and plaintiff can sue for the recovery of the balance, if not under native law, then at common law. The contract for the payment

of dowry in respect of a customary union is one peculiar to native law and custom, and if such law and custom provides its own procedure for the enforcement of such contracts that procedure must be followed. The point must therefor be decided according to native law.

The facts in this case as disclosed in the pleadings are very similar to those in Skweyiya *v.* Sixakwe [1941 N.A.C. (C. & O.) 126]. In that case Scott (Acting President) held that it was immaterial whether the defendant agreed to pay a fixed number of cattle as dowry, that the plaintiff could not sue for the balance of the dowry, and that his only remedy to compel payment of the dowry agreed upon is to *teleka* the woman. But some of the authorities on which the learned President relied seem to imply that a contract for the payment of dowry can be enforced by action at law if the contract is clearly established. The question was therefore referred to the Native Assessors—a record of their opion is annexed—They state unequivocally that according to native custom a guardian cannot maintain an action at law for the recovery of dowry payable for his ward even if the balance of the dowry owing is admitted, but that he must invoke the custom of *ukuteleka*. This is what we always understood the custom to be.

In cases where the defendant had married his wife according to christian rites and had agreed to pay a specific number of cattle as dowry, Courts have allowed the plaintiff to sue on the agreement, but this is so purely because the plaintiff is not permitted to *teleka* the wife. This may appear to be illogical, but there is this to be said for it that the payment of dowry is not necessary for the validity of a civil or Christian marriage. The lobolo contract is ancillary to the marriage contract and by entering into the marriage the only remedy open to the plaintiff is an action at law.

In Ngalimkulu *v.* Mndayi [1947 N.A.C. (C. & O.) 65] it was held that a plaintiff can sue for delivery of cattle paid by description but not pointed out, but in such a case the action is really for the delivery of specific cattle actually paid. This is clearly distinguishable from an action on an agreement to pay dowry.

The appeal consequently fails and is dismissed with costs.

Assessors' Opinions.

Names of Assessors: Ntabazulu Mtirara (Umtata), E. C. Bam (Tsolo), John Ngcwaba (Cofimvaba), Bokleni Dalasile (Engcobo) and Sipendu Bacela (Mqanduli).

Question: A father gives his daughter in marriage and says he wants 12 head of cattle as dowry. His son-in-law agrees to pay this amount and pays eight head on account leaving four owing. Can the father sue for these cattle or must he *teleka* the woman ? (Cattle not pointed out or discribed.)

Answer (per John Ngcwaba): By our custom he cannot sue but must *teleka* the girl for the four head.

All agree.

Question: Is this so if the son-in-law admits owing the four head ?

Answer (per John Ngcwaba): By custom the woman must be *telekaed*.

Question: If the father brings an action in your Court will your Court say " we will not listen to the case, you must *teleka* the girl ?"

Answer (per John Ngcwaba): We would drive him away. If he should pay one beast the woman must be released from *teleka*.

For Appellant: Mr. Chisholm, Umtata.

For Repondent: Mr Muggleston, Umtata.

CASE No. 68.

SEBENZEYAKE MBOTOLI, ASSISTED BY NO-EIGHT MBOTOLI *v.* CEKISO MADLAKENI.

UMTATA: 22nd June, 1949. Before J. W. Sleigh, Esq., President, Bates and Cornell, Members of the Court (Southern Division).

Native Appeal Case—Practise and Procedure—Mandament van Spolie—*Essential allegations*—ex parte *order should not be granted if essential-s not proved—Court has no power to amend affidavit—Confirmation of* ex parte *order—Should be refused if proof of possession is unsatisfactory.*

Appeal from the Court of the Native Commissioner, Umtata.

Sleigh (President), delivering the judgment of the Court:

In an application for a *Amandament van Spolie* made *ex parte* applicant (hercin referred to as respondent) obtained a rule *nisi* calling upon one Mbotoli Balincwadi to show cause on 12th January, 1949, why he shall not be ordered *ante omnia* to restore to respondent

certain four cattle. In the supporting affidavit respondent declares that the cattle were in his peaceful possession on 6th December, 1948, and that on that date they were spoliated by Mbotoli from the commonage near respondent's kraal.

On return day respondent's attorney applied without notice to the opposite side, for the substitution of the name of Sebenzeyake Mbotoli duly assisted (herein referred to as appellant) in the original application, in the order and in the affidavit, in place of the name of Mbotoli. This application was granted and the Court granted a fresh *ex parte* order against appellant calling upon him to show cause on 26th January, 1949. On this date both parties were present and after hearing *viva voce* evidence from both sides the Additional Native Commissioner entered the following judgment, " Spoliation order granted as prayed with costs. " From this judgment appellant has appealed.

The absolute essential allegations for a *mandament van spolie* are:—

(*a*) That the applicant was in peaceful and undisturbed possession of the property; and

(*b*) that the respondent deprived him of that possession forcibly or wrongfully against his consent.

Now, when the fresh order was granted against appellant on 12th January, 1949, there was not a tittle of evidence, either *viva voce* or on affidavit before the Court that appellant or any person on his behalf had spoliated the cattle, and the *ex parte* order should therefore not have been made. When it was found that the alleged spoliator (Mbotoli) had died before the spoliation, application was made to substitute in the affidavit the name of appellant for that of Mbotoli. It is not competent for the Court to amend the affidavit. If the deponent had made a mistake he can correct his evidence by means of a further affidavit setting out the true facts. This he did not do and there was therefore no evidence before the Court to connect appellant with the spoliation.

Apart from this the trial Court should not have confirmed the *ex parte* order, because there is no satisfactory evidence that respondent was ever in the possession of the cattle.

It is common cause that one Mgaqelwa first married the sister of appellant and paid eight cattle as dowry to his father and that the four cattle in question form part of that dowry. Mgaqelwa states that after the death of his first wife about three years ago, No-eight, the mother of appellant, refunded to him the four cattle and 10 goats under the *ukuketa* custom. His evidence on this point stands alone and is denied by the defence. He goes on to say that he then married respondent's daughter and delivered the four cattle to him during the green mealie season, 1948. Respondent corroborates this evidence, whereas the defence witnesses say that the cattle never left No-eight's kraal. It is not disputed that the cattle are still registered in No-eight's name, and that respondent and Mgaqelwa live in Baziya Location and No-eight in Xongora Location which adjoins Baziya, both locations being in Umtata District.

Now, there was no legal obligation upon No-eight to refund the cattle. This refund should therefore have been conclusively proved. Further the refund is alleged to have been made on the death of Mgaqelwa's first wife, that was three years ago. His explanation that the cattle were still registered in No-eight's name because no stock removals were allowed at the time should therefore have been rejected. The explanation is in any case inconsistent with his subsequent statement that No-eight was always too busy to go to the dipping tank to effect transfer, and also with the statement that the cattle were in fact removed from No-eight's kraal in Xongora Location to respondent's kraal in Baziya Location. Moreover, respondent's statement that he did not know whether the cattle were still registered in No-eight's stock card is palpably false.

The Native Commissioner has criticised the evidence for the defence because of contradictions and discrepancies. It seems to me that the contradictions do not amount to much. No-eight says that she did not know respondent but later admitted that she did. She explains her first statement by saying " I did say I dont't know him because I never handed the cattle to him ". Natives frequently deny knowing a person when all they mean is that they have had no business or other transactions with him. It is obvious that this is what No-eight meant, otherwise she would not have freely admitted having seen respondent's wife at his kraal.

Then again, she contradicts other defence witnesses as to the number of female cattle which were paid to her as dowry. It is difficult to see what bearing this has on the case. At any rate it bears out her statement that she did not know much about her cattle. Her statement that Nini dipped the stock means no more than that, as head of the kraal, he attended to the dipping.

Nini was absent from the district about the time the alleged refund was made. His evidence lacks candour, but as head of the kraal he would have been consulted if there had been a *keta*.

Appelant's evidence that he herded these cattle and dipped them and that they never left his mother's kraal more than rebuts the evidence for respondent.

I realise that this Court has not had the advantage of hearing and seeing the witnesses, but the evidence that the cattle had been refunded to Mgaqelwa is so uncertain and improbable that it cannot be accepted. As Mgaqelwa's evidence of the *keta* goes to the root of case, its rejection destroys the only basis of respondent's claim to possession, and without proof of such possession his claim for confirmation of the rule *nisi* should have been refused.

The appeal is allowed with costs and the judgment of the Court below is altered to read—

" The rule *nisi* granted on 12th January, 1949, is discharged with costs. "

For Appellant: Mr. Alison, Umtata.

For Respondent: Mr. Knopf, Umtata.

CASE No. 69.

NDOBELA MLINGISI *v.* **TESHEKI NGQOTSO.**

KINGWILLIAMSTOWN: 14th July, 1949. Before J. W. Sleigh, Esq., President, van Heerden and Warner, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Return of customary wife or restoration of dowry—Marriage by native custom—Dissolution of marriage—If husband drives away wife on charge of practising witchcraft he forfeits all claim to dowry paid for her—Bare driving away of wife does not automatically dissolve marriage—Ukuteleka *Custom—Husband entitled to release of wife upon payment of portion dowry claimed—Failure to pay or tender beast is bar to action for recovery of wife.*

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President), delivering the judgment of the Court:

This is an appeal against a judgment of absolution in an action in which appellant (plaintiff in the Court below) claims the return of his customary wife, Nowinile, the sister of respondent against payment of £5 representing a *teleka* beast, which amount was paid into Court; alternatively, the return of the dowry paid less deductions, namely six head of cattle or their value £30 and custody of the female child of the union.

It is common cause that appellant married Nowinile about the year 1942, that he paid eight head of cattle as dowry, that a wedding outfit was provided and that there is one child of the union.

It is not disputed that appellant and his wife separated about the end of 1946 or the beginning of 1947, when they were living on the farm of Mr. Goosen in Sterkstroom district. Nowinile says she left him because he drove her away. Her evidence as to the " driving away " is as follows:—

> " A few days before my husband drove me away he beat me. I dished up food for him. He pushed the food away. He rowed me and said I must go away, I am a witch. "

She says that on her husband's instructions she took her belongings and then complained to her master who tried unsuccessfully to effect a reconciliation. Appellant is unable to dispute this evidence. He says that he was mentally deranged and does not recollect what took place.

The evidence that he was ill is supported by the undisputed fact that, although he was dismissed by his master, he did not leave the farm until he was fetched by his elder brother.

It is further not disputed that about July, 1948, appellant *putumaed* his wife during the absence of respondent, that she refused to return to him, that he then complained to a Board member who decided that she must return, and that after this ruling respondent's mother, who represented him at the enquiry, demanded five head of cattle as futher dowry which appellant agreed to pay. Thereafter he *putumaed* her again on two occasions without securing her return. He then consulted his attorney who sent two demands and, in reply thereto, respondent's attorney wrote on 4th November, 1948, alleging that appellant had driven away his wife upon an allegation of witchcraft and consequently had repudiated the marriage and forfeited the dowry paid by him, but stating that he has always been agreeable to allow the woman to return on payment of the balance of the dowry, namely, five head of cattle.

Appellant's attorney then tendered £5 representing a *teleka* beast. This was refused and respondent then took up the attitude that appellant had repudiated his wife and dissolved the union and that he was not entitled to the return of the dowry. It is on this basis that appellant's claim is resisted.

The sole question for decision is therefore whether the union had been dissolved. The onus of proving this is on the respondent.

The Additional Native Commissioner was not satisfied that the dissolution of the union had been proved but gave an absolution judgment because he found that the evidence does not support the allegation that respondent had impounded the woman under the custom of *ukuteleka*, and even if this were so, the payment of five pounds in cash does not amount to the payment of a dowry beast.

Counsel for respondent states that he is unable to contend that the tender of £5 in lieu of a *teleka* beast was not a sufficient tender under the *ukuteleka* custom; he also concedes that if respondent had failed to prove the dissolution, judgment should have been given for appellant, but he submits that since appellant admits that he drove away his wife, the Native Commissioner should have found that the dissolution had been proved.

As a general rule if a husband drives away his wife on a charge of practising witchcraft he forfeits all claim to his wife and the dowry paid for her, the union being regarded as having been dissolved (Mafaka *v.* Dyaluvana 1 N.A.C. 65); but if he acts promptly he can recover his wife upon payment of an *isinuka* beast (Kwada Mbi *v.* Magqabenbuzi, 4 N.A.C. 175). But in the present case there is no evidence that appellant caused his wife to be " smelt out ". The statement that she was a witch seems to have been mere abuse uttered by him while of unsound mind. His persistent efforts to obtain her return show that he did not accuse her of practising witchcraft.

Appellant, however, admits that he did drive his wife away. But the bare driving away of a wife does not automatically dissolve a customary union. In Bobotyane *v.* Jack [1944 N.A.C. (C. & O.) 9] McLoughlin (President) said " Native law does not recognise a dissolution of the union by mere desertion of the wife or the husband, by abandonment, or even by bare repudiation, . . . the husband can always *putuma* his wife after any length of absence; the wife or widow can always return to her husband's kraal . . . and resume her former status . . . On the part of the husband, he had the right to repudiate the wife, with forfeiture of his lobolo if the act be unjustified in Native law, but before the wife can act on such repudiation and remarry it is necessary either to return all or some of the lobolo, or to take the matter before the headman or chief and obtain a public repudiation by the husband. "

Now, it is perfectly clear from the demand for the payment of further dowry after the matter had been before the Board member, and from the letter dated 4th November, 1948, written by respondent's attorney, that respondent never regarded the union as having been dissolved. Indeed, in native law there was no dissolution, as none of the dowry had been restored nor was a public repudiation obtained. On the contrary, the statement in the letter of the 4th November that he *has been* agreeable to allow the woman to return upon payment of the balance of the dowry, clearly shows that he was holding the woman under the *ukuteleka* custom.

The custom of *ukuteleka* is invoked for two separate and distinct purposes. Primarily, it is the only procedure available to the guardian of a woman to enforce payment of balance of dowry, but it is also resorted to to punish a husband for ill-treatment or abuse of his wife. If the wife has been *telekaed* for further dowry the husband is entitled to her release upon payment of any portion of the additional dowry claimed (Solani *v.* Manxiwa, 4 N.A.C. 342) and failure to pay or tender payment of a *teleka* beast is a complete bar to an action for the return of the wife or of her dowry. (Zenzile *v.* Roto, 1 N.A.C. 223.)

In the present case appellant has tendered £5 which, counsel for respondent accepts, is the monetary equivalent of a dowry beast and consequently respondent has no legal right to detain appellant's wife or her dowry.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read—

> " For plaintiff with costs for the return of his wife on or before 25th August, 1949, failing which for the payment of six head of cattle or their value reckoned at £5 per beast. If the woman is returned to plaintiff defendant is entitled to the £5 paid into Court. "

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: Mr. Randall, Kingwilliamstown.